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IN THE

Supreme Court of the United States

No. 771

OCTOBER TERM

1968

PETITION FOR WRIT OF CERTIORARI

TO

THE SUPREME COURT

ON APPEAL FROM UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

U.S. Ex Rel
CHESTER ORSINI

vs.

FREDERICK REINCKE,
Warden

CHESTER ORSINI

BY: IGOR I. SIKORSKY, JR.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM
1968

CHESTER ORSINI	:	PETITION FOR WRIT OF CERTIORARI ON DIRECT APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
VS.		
FREDERICK REINCKE, Warden	:	

Chester Orsini, petitioner herein, respectfully prays that a writ of certiorari issue to review the final judgment of the United States Circuit Court for the Second Circuit entered on the 22nd day of June, 1968, affirming the judgment of the United States District Court for Connecticut (per Judge Blumenfeld) dismissing the petition for habeas corpus.

OPINION BELOW

The opinions of the United States District Court and of the United States Court of Appeals for the Second Circuit, appear in Appendix A and B attached hereto.

JURISDICTION

The judgment of the United States Court of Appeals was entered on June 22, 1968. On September 9, 1968, the Honorable John M. Harlan, extended the time within which the petition to the United States Supreme Court could be filed to November 22, 1968. The jurisdiction of this court is envoked under 28 U.S. Code 1254.

QUESTIONS PRESENTED

1. Whether the right to speedy trial can be waived by silence on the part of the accused; i.e., if a record indicates

a long delay with no effort by either the state or the accused to force a trial is the trial court entitled to infer from the accused's passivity, a waiver of his right to a speedy trial?

2. Does an accused waive objection to his arrest under a bench warrant in violation of Article Fourth of the United States Constitution by his subsequent appearance and plea in court, if objection to the validity of the warrant is made prior to trial?

3. Was *Frisbie vs. Collins,* 342 U.S. 519 overruled *sub* silencio by *Aguilar vs. Texas,* 378 U.S. 108?

UNITED STATES CONSTITUTIONAL PROVISIONS INVOLVED

The United States Constitutional provisions involved are the Sixth Amendment's guarantee to a "speedy trial" and the Fourth Amendment's provision that "no warrant shall issue, but upon probable cause, supported by oath or affirmation . . .".

STATEMENT OF THE CASE

The facts underlying this Appeal are essentially not in dispute and are summarized in the opinion of the Court below, (Appendix A.) They are summarized briefly as follows:

The State alleged that during the month of October, 1964, the Petitioner (defendant) aided and abetted the commission of an abortion. On November 13, 1964, a bench warrant was issued for his arrest and was served on November 14, 1964. On November 20, 1964, an attorney entered a plea of not guilty and elected a trial by jury.

The case lingered on the assignment list without any action from November 20, 1964 until October 26, 1965. On

that date the case was assigned for trial. Another attorney entered his appearance for the defendant and filed a motion attacking the sufficiency of the bench warrant and also filed a motion to dismiss the information on the ground that the petitioner had been denied the right to a speedy trial. Both these motions, which were filed prior to the commencement of the trial, were overruled and the trial commenced thereafter. It is clear that at no time was a request made by the defendant or his counsel for a speedy trial. Nor, however, did the defendant at any point seek any delay. In Connecticut, the criminal assignment docket is set by the office of the State's Attorney (the county prosecuting official).

The case was tried to a jury in November, 1965 and a verdict of guilty was returned. On December 10, 1965, the petitioner was sentenced to serve a term of not less than one (1) year nor more than four (4) years in the Connecticut State Prison, which term he commenced serving on September 26, 1967, following the disposal of his appeal by the Supreme Court of the State of Connecticut (*State vs. Orsini,* Conn. Law Journal, Vol. 29, No. 4, July 25, 1967).

Following the State of Connecticut's dismissal of his direct appeal, Orsini filed a petition for habeas corpus in the United States District Court which was heard in due course by the Honorable M. Joseph Blumenfeld (*U.S. Ex Rel Chester Orsini vs. Reincke, Warden,* Docket No. 12,295) who dismissed the petition (Appendix A). The petitioner appealed to the United States Court of Appeals for the Second Circuit which affirmed the opinion of Judge Blumenfeld (Appendix B).

ISSUES PRESENTED

I. Can waiver of the petitioner's rights to a speedy trial be presumed from the accused's failure to seek a speedy trial?

At this point there can be no question that the Federal Constitutional provisions concerning the right to a speedy trial are applicable to the States.

Klopfer vs. North Carolina,
386 U.S. 213, 218, 87 S. Ct. 988, 18 L.Ed.2dl

Thus, the question raised by this case is who has the burden of proof to explain the reason for the lack of a speedy trial and furthermore, who has the burden on the question of whether prejudice resulted from the delay. Finally, there is the question as to whether in instances of delay as severe as this case, the petitioner need show any prejudice whatsoever. Clearly the delay of approximately a year from the date of offense and approximately 50 weeks from the date of arrest would be "Unexplained . . . an undue delay." *Orsini, supra.*

Before proceeding to consider the particular showing of prejudice, the petitioner emphasizes that certain cases hold that the burden is not on the defendant to prove prejudice but rather rests with the Government to show lack thereof. *Hanrahan vs. United States,* 348 F.2d 363, 368 (D.C. Cir. 1965). And this is particularly true when the delay has been great since in such situations, prejudice is presumed unless the Government proves to the contrary. *Jackson vs. United States,* 351 F.2d 821, 822 (D.C. Cir. 1965). In the instant case the state never offered evidence to the contrary.

Even if this court should hold that some basis of prejudice should affirmatively be shown by the petitioner, it would appear that it need not be absolute showing beyond any reasonable doubt. Many decisions have recognized the fact

that human memory is, or can be, frail. A delay of time may dim the precision of a witness. In the instant case, the trial counsel, Attorney Peter Zaccagnino, during the court hearing of the Habeas Corpus proceeding testified that the petitioner's faulty memory concerning the details of his whereabouts and activities during the time in question was one of those factors persuading him not to call the petitioner as a witness. (Appendix A.)

It is submitted that this is a sufficient element to prove prejudice. This was shown to be so in *Ross vs. United States,* 349, F.2d 210 (D.C. Cir. 1965), where the court dismissed a case after a delay of seven months, relying in part on the fact that the Government's case rested on the testimony of a single eyewitness. The Second Circuit analyzed the *Ross* case in *United States vs. Sanchez,* 361 F.2d 824, 825 (2Cir.1966), and pointed out the significance of this fact.

When a day is not unusual in itself and is not surrounded by or set off by other unusual events, the time in which the memory of it lasts is comparatively short. A person may vividly recall December 7, 1941, and yet not recollect the events of a day in October 1964. The passage of time and its effects on the human memory, therefore, should be significant in a "speedy trial" case. Further, the by-product of this lapse is the loss not only of memory but also of contact with the persons or things which might refresh it. Consequently, the defendant submits that the cases recognizing this phenomenon as an element of prejudice are proper and just and pertinent to the petitioner's claim. *Jackson vs. United States,* 351 F.2d 821, 823 (D.C. Ct. 1965); *Ross vs. United States,* supra at P. 215; *Caunady vs. United States,* 351 F.2d 817, 818 (D.C. Cir. 1964).

Based on the foregoing the defendant believes that he has met the requirement of demonstrating prejudice in line with the burden of proof set forth in *Jackson vs. United States,* supra. In fact, he believes that this proof would satisfy a

higher burden, if imposed. Finally, it is submitted that the absence of any proof by the Government that he was not prejudiced should be borne in mind in the event that the court concludes that the burden is on the prosecution, as was held in *Jackson vs. United States,* supra.

In summary on the question of unreasonable delay, the petitioner contends: (1) Proof of prejudice is unnecessary if an unreasonable and unexplained delay is shown on the fact of the record. This is our reading of *U.S. vs. Lustman,* 258 F.2d 475 (2nd Cir. 1958); or in the alternative, (2) Proof of explaining the delay rests upon the Government, *U.S. vs. Lustman, supra; Fonts vs. U.S.,* 253 F.2d 215, 218 (6th Cir. 1958); *Taylor vs. United States,* 238 F.2d 258, 261-2 (D.C. Cir. 1956).

An analysis of cases to the contrary, the decision appears to emphasize the fact that the defendants all appear to show affirmative action on the part of the defendant causing the delay. For example, if the Government could show a need for further investigation or a delay caused by the absence of the defendant, the provision might not apply. However, the State's position appears to be that there will be a waiver implied unless the defendant fights tooth and nail to get himself into the courtroom and expose himself to the consequences thereof as quickly as possible. The petitioner feels that this is not in accord with the prevailing view of the right to speedy trial of cases, nor is it a realistic or equitable prerequisite to impose upon a defendant who seeks to assert a constitutional privilege.

II. If a bench warrant is constitutionally defective because of a lack of supporting "oath or affirmation" is this waived by the appearance in court of the accused?

It is clear from the underlying record and conceded by the state that an initial process against the petitioner was constitutionally infirm because the warrant lacked an "oath

or affirmation". The petitioner attacked this defect by the appropriate motion and pursued his attack on the jurisdiction through the Supreme Court of the State of Connecticut, *State vs. Orsini,* supra; *Frisbie vs. Collins,* 342 U.S. 519 would appear to hold that no matter how a man is hailed into court, once there he is subject to the jurisdiction of the court. However, the petitioner contends that *Frisbie* must be read in the light of *Aguilar vs. Texas,* 378 U.S. 108, 1964 (decided June 15, 1964). Subsequent cases have ruled that the effective date of *Aguilar* governs the applicability of the requirements for the oath and affirmation and makes these federal constitutional standards binding upon the states. The only consistent reading of *Aguilar* would be a *sub silencio* modification of *Frisbie.* Otherwise, there would be no way in which a petitioner could challenge his being brought into court. To put it another way, if *Frisbie* is to be interpreted as an absolute right on the part of the State to bring a defendant before its courts and to preclude any question about the method whereby he was summoned into court, then *Aguilar* is meaningless. *Aguilar,* to have any rationale, must limit the absolute right to the State in some way or other. Then the question comes up, as it did in *Licari,* when must this right be asserted? In *Licari* the challenge to the sufficiency of the warrant was made after a plea of not guilty was introduced and prior to trial. This is precisely the same circumstance as in the petitioner's case.

The petitioner contends that the warrant was *void,* not voidable. If initial jurisdiction was void, the judgment is *coram non judice* and a court has no alternative but to order immediate release.

The Supreme Court of Connecticut has stated:

> "An accused may waive any matter of form or substance, excepting only what may be related to the jurisdiction of the court, *State vs. Brockhaus,* 72 Conn.

> 109 (1899) . . . . jurisdiction cannot be conferred by agreement, acquiescence, consent or waiver. *McDonald vs. Hugo,* 93 Conn. 360 (1919)."

If want of jurisdiction is shown, then the judgment is absolutely void, and the petitioner is entitled to immediate release.

Woljculewicz vs. Cummings
143 Conn. 624 (1956)

In a holding directly in point, the Supreme Court of New Mexico held that a formal accusation cannot be waived. In *State vs. Chacon,* 62 N.M. 291, 309 P.2d 230 (1957), an accused pled guilty to a charge and received a suspended sentence. Subsequently, he appealed his sentence on the grounds of the invalidity of his arrest. The Court held that since the arrest warrant was invalid the Trial Court never acquired jurisdiction and this could not be waived. The sentencing court was *coram non judice* and the appellate court stated:

> "A party cannot waive a constitutional right when its effect is to give a court jurisdiction." (Citing Hawes on Jurisdiction, Sect. 11 and 12)

To the same effect, see *dicta* in *Smith vs. Abram,* 58 N.M. 404, 271 P.2d 1010, where the Court stated:

> "That a person may *not* be punished for a crime without a formal and sufficient accusation *even* if he voluntarily submits to the jurisdiction of the court, *cannot be questioned.*"

Smith vs. Abram, supra
(Emphasis supplied)

Based on the foregoing arguments, petitioner contends that *Frisbie* should not be read as an absolute bar to the challenge of the jurisdiction over the person of a defendant.

Under the circumstances in this case, the defendant made timely challenge prior to the commencement of the trial to the validity of the process which commenced the State proceedings against him. The petitioner contends that it is inconsistent to take the position that the silence of the record is insufficient in durational time to find waiver of this claim and yet insufficient to find delay resulting in the denial of a speedy trial.

CONCLUSION

Based upon the foregoing, petitioner contends that substantial issues pertaining to the administration of criminal courts, in the field of "speedy trial" and "arrest warrants" are unresolved and prays this Court to grant certiorari.

Supreme Court of the United States

U.S. Ex Rel
CHESTER ORSINI

vs.

FREDERICK REINCKE
Warden

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX

TO APPELLANT'S BRIEF

APPENDIX A

U.S. Ex Rel Chester Orsini vs. Reincke, Warden

U.S. District Court of Connecticut, Docket No. 12,295

MEMORANDUM OF DECISION ON PETITION FOR WRIT OF HABEAS CORPUS

Exhaustion of State Remedies

Chester Orsini, presently confined in the Connecticut State Prison under a sentence of not less than one nor more than four years imposed after his conviction by a jury for aiding and abetting in the commission of an abortion in violation of Conn. Gen. Stats. § 53-29, petitions for a writ of habeas corpus.

The first two grounds to be considered have been adversely decided on direct appeal to the Supreme Court of Connecticut, *State vs. Orsini,* 29 Conn. L.J., July 25, 1967, at 10. As to those, his state remedies have been exhausted. *United States ex rel. West vs. LaVallee,* 335 F.2d 230 (2d Cir. 1964).

Illegal Arrest

The petitioner's first claim is that because his arrest was under a bench warrant issued without the support of any affidavit of probable cause, his conviction was void for lack of jurisdiction over his person. He relies upon *State vs. Licari,* 153 Conn. 127, 214 A.2d 900 (1965). Promptly after that decision, several state prisoners sought writs of habeas corpus in this court on the same ground asserted by Orsini. These petitions were consistently dismissed. *E.g., United*

States ex rel. Jackson vs. Reincke, Civil No. 11,619 (D. Conn. Jan. 11, 1967; *United States ex rel. Beatty vs. Reincke,* Civil No. 11,734 (D. Conn. Dec. 13, 1966); *United States ex rel. Pinto vs. Reincke,* Civil No. 12,186 (D. Conn. Oct. 2, 1967). Since additional petitions are still being filed in this court,[1] perhaps a fuller exposition of the reasons for those dismissals than was previously thought necessary may be appropriate.

The rule that an illegal arrest without more does not void a conviction and is not ground for a collateral attack by habeas corpus is well established whether the conviction was by a federal, *Moreland vs. United States,* 347 F.2d 376 (10th Cir. 1965); *Roddy vs. United States,* 296 F.2d 9 (10th Cir. 1961), or a state court. *United States ex rel. Burgett vs. Wilkins,* 283 F.2d 306 (2d Cir. 1960), *cert. denied,* 365 U.S. 848 (1961).

It does not matter how grossly illegal the arrest may have been. Even where it was assumed that a state prisoner had been made the victim of a kidnapping by state officers in violation of the Federal Kidnapping Act in order to have him brought to trial for his crime, the Supreme Court of the United States affirmed the denial of a writ of habeas corpus in *Frisbie vs. Collins,* 342 U.S. 519 (1962). The rule and its rationale are stated at 522:

> "This Court has never departed from the rule announced in *Ker vs. Illinois,* 119 U.S. 436, 444,[2] that the power

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[1] More are likely on the way. The Supreme Court of Connecticut has recently affirmed the denial of the writ in six similar cases. *Reed v. Reincke,* 29 Conn. L.J., Dec. 19, 1967, at 3; *D'Amico v. Reincke,* 29 Conn. L.J., Dec. 26, 1967, at 6; *SanGiovanni v. Reincke,* 29 Conn. L.J., Dec. 26, 1967, at 6; *Gould v. Reincke,* 29 Conn. L.J., Dec. 26, 1967, at 7; *Langley v. Reincke,* 29 Conn. L.J., Jan. 2, 1968, at 18; *Ritchie v. Reincke,* 29 Conn. L.J., Jan. 2, 1968, at 19.

In each of the foregoing cases, the denial was held to rest on a waiver based on the petitioner's failure to raise an objection to the illegality of his arrest before pleading to the information charging him with a criminal violation.

[2] This was before the Court for direct review of a writ of error to the Supreme Court of the State of Illinois.

> of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a 'forcible abduction.' [Cited cases omitted]. No persuasive reasons are now presented to justify overruling this line of cases. They rest on the sound basis that due process of law is satisfied when one present in court is convicted of crime after having been fairly apprized of the charges against him and after a fair trial in accordance with constitutional procedural safeguards. There is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will."

A fortiori, illegal arrest of Orsini by local police raises no federal question. *United States ex rel. Burgett vs. Wilkins,* 283 F.2d 306; *Moore vs. Martin,* 273 F.2d 344 (2d Cir. 1959), *cert. denied,* 363 U.S. 821 (1960). The important point which I do not think the petitioner has grasped is that his conviction does not rest in any part on the proscribed arrest.

In testing whether "due process of law is satisfied," *Frisbie vs. Collins,* 342 U.S. at 522, concern is only with constitutional violations which have a prejudicial effect upon the guilt determining process at the trial. The relationship between the remote concept of an illegal arrest and a later conviction of the arrestee at a trial is established only when there is a functional link between the two. It is not the rupture of a defendant's privacy — whether of his home, or his person — but the use of the fruits of that unconstitutional intrusion to obtain his conviction that is forbidden, e.g. the admission at the trial of evidence obtained by an unlawful search and seizure. *Mapp vs. Ohio,* 367 U.S. 643 (1961). See also, *Giordenella vs. United States,* 357 U.S. 480 (1958) (narcotics seized under an invalid warrant); *Aguilar vs. Texas.* 378 U.S. 108 (1964) (narcotics); *Beck vs. Ohio,* 379

U.S. 89 (1964) (betting slips).[1] However, if evidence of a defendant's guilt obtained as a result of an unconstitutional search or arrest was not introduced at his trial, there is no ground for assailing its fairness under due process standards, for the illegal seizure has had no prejudicial effect in the determination of his guilt. *Dorsey vs. Gill,* 148 F.2d 857, 876 (D.C. Cir.), *cert. denied,* 325 U.S. 890 (1945) (coerced confession); *Price vs. McCarty,* 89 Fed. 84 (2d C.C.A. 1898) (original indictments insufficient); *United States ex rel. Williams vs. Myers,* 196 F.Supp. 280 (E.D. Pa. 1961) (illegally seized evidence); *Madison vs. Tahash,* 249 F.Supp. 600, 608 (D. Minn.), *aff'd,* 359 F.2d 60 (8th Cir. 1966) (illegally seized evidence); *Mihailoviki vs. California,* 364 F.2d 808 (9th Cir. 1966) (illegally seized evidence). *Cf. Kristiansand vs. United States,* 319 F.2d 416 (5th Cir. 1963) (uncoerced statement); *Hamilton vs. North Carolina,* 260 F.Supp. 632 (E.D. N.C. 1966) (legal arrest so pistol and burglary tools admissible); *Edgerton vs. North Carolina,* 239 F.Supp. 663, 666 (E.D. N.C. 1965) (opinion of Chief Circuit Judge Clement F. Haynsworth, Jr.); *United States ex rel. Gary vs. Hendrick,* 238 F.Supp. 757, 759 (E.D. Pa. 1965); *United States ex rel. Brink vs. Claudy,* 96 F.Supp. 220 (W.D. Pa.), *aff'd,* 194 F.2d 535 (3d Cir. 1951), *rehearing denied,* 102 F.Supp. 802 (W.D. Pa. 1952), *cert denied sub nom. Brink vs. Commonwealth of Pennsylvania,* 345 U.S. 930 (1953).

To epitomize the rule, an illegal arrest alone does not merit habeas corpus relief. See *Pappillion vs. Beto,* 257 F.Supp. 502 (S.D. Tex. 1966).

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[1] There is a little play in the rule. The constitutional barrier against the use of evidence which would "not have come to light but for the illegal actions of the police" is not absolute. *Wong Sun v. United States,* 371 U.S. 471, 488 (1963). It was recently noted in *United States ex rel. Suarez v. Follette,* ....F.2d.... (2d Cir. Jan. 10, 1968), that "The Supreme Court has commented that the question to be asked is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" Thus, if the challenged evidence was also obtained from an "independent source," or if the connection between the arrest and the evidence has "become so attenuated as to dissipate the taint" (371 U.S. at 491), its use at the trial of the accused does not violate constitutional guarantees. *E.g., State v. Traub,* 151 Conn. 246, 196 A.2d 755 (1963), *cert. denied,* 377 U.S. 960 (1964).

The underlying reason for excluding evidence come upon illegally as articulated in the cases cited above reveals that concern is with the integrity of the judicial process. The cases are not to be read as holding that an illegal arrest per se bars prosecution for all time. To do that would exalt form over substance.[4] The office of habeas corpus is to vindicate due process, not police mistakes.

Now I must digress for a moment to point out that what has been said does not leave an accused without any remedy for his illegal arrest. Admittedly, he could sue the officers responsible for it in an action for false arrest, or false imprisonment. *Church vs. Pearne,* 75 Conn. 350, 53 A. 955 (1903). *Cf. Ker vs. Illinois,* 119 U.S. 436, 444 (1886). But he is not entitled to the added bonus of freedom from his own responsibility to society for his violations of the criminal laws. "A writ of *habeas corpus* is not like an action to recover damages for an unlawful arrest or commitment, but its object is to ascertain whether the prisoner can lawfully be detained in custody; and if sufficient ground for his detention by the government is shown, he is not to be discharged for defects in the original arrest or commitment." *Nishimura Ekiu vs. United States,* 142 U.S. 651, 662 (1892), quoted with approval in *United States ex rel. Bilokumsky vs. Tod,* 263 U.S. 149, 158 (1923).

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[4] Where constitutionally impermissible evidence has been allowed to infect a trial, ordinarily the case is remanded for a new trial at which the illegally seized evidence must be excluded. *E.g., Giordenello v. United States,* 357 U.S. at 488. Double jeopardy is not involved. See *United States v. Tateo,* 377 U.S. 463 (1964).

In some few cases, where it has been apparent that without the use of the tainted evidence there would be no remaining basis for a successful prosecution, an appellate court has summarily reversed the judgment. *E.g., United States v. Soyka,* ....F.2d.... (2d Cir. Jan. 18, 1968). While the opinion in *Licari* does not refer to it, the record shows that in proving one count the prosecution introduced a slip of paper with betting notations on it, which the officers grabbed from him as he attempted to swallow it when he was being illegally arrested. Without use of that evidence on a retrial, the Supreme Court might well have concluded that the chance of a successful prosecution was so minimal as to justify dismissal of the whole case in the interest of saving judicial time. *Cf. State v. Newman,* 127 Conn. 398, 17 A.2d 145 (1941); *State v. Palkimas,* 153 Conn. 555, 219 A.2d 220 (1966).

Since the present restraint of Orsini's liberty stems not from his earlier arrest but from a judgment of conviction after a trial which met the general due process standard of fairness, his present detention is not in violation of federal law. See *Pebley vs. Knotts,* 95 F.Supp. 283, 286 (N.D. W.Va. 1951).

In light of the determination on the merits that there was no underlying infringement of his constitutional rights to support a writ of habeas corpus, it is not necessary to consider whether any procedural default in going to trial without putting his illegal arrest in issue would bar him from making that challenge. But see *State vs. Orsini,* 29 Conn. L.J. at 10; and cases cited in n. 1.

Speedy Trial

The second claim of the petitioner is that he did not "enjoy the right to a speedy and public trial" as guaranteed by the sixth amendment. Recently in *Klopfer vs. North Carolina,* 386 U.S. 213 (1967), where a petitioner challenged the state's right to continue a criminal charge against him indefinitely without reason, the Supreme Court held that the sixth amendment right to a speedy trial was applicable to the states through the fourteenth amendment.

The connotation of "speedy" in 1791 was somewhat different than it is today. The defendant's right is to an "orderly expedition (of the trial procedures) and not mere speed." *Smith vs. United States,* 360 U.S. 1, 10 (1962). See also *United States vs. Ewell,* 383 U.S. 116, 120 (1966).

Orsini was arrested on November 14, 1964. His trial began on October 26, 1965. No motion was made or other action taken by the petitioner or his attorney to get the case tried any sooner than it was. That passivity is alone sufficient reason to reject his claim. See *United States vs. Small,* 363 F.2d 417 (2d Cir. 1966), *cert denied,* 385 U.S.

1027 (1967); *United States vs. Lustman,* 258 F.2d 475 (2d Cir. 1958), *cert. denied,* 358 U.S. 880 (1959).

The state court held that the petitioner acquiesced in the delay. See *State vs. Orsini,* 29 Conn. L.J. at 10. Nothing was offered at the hearing in this court to undermine the soundness of that conclusion or the adequacy of the record to support it. See 28 U.S.C. § 2254(d) and (e).

A tangential attack in this court sought to establish that the petitioner had been prejudiced by the delay. The argument was made that trial counsel, engaged the day before the trial commenced, decided not to have the petitioner take the stand in his own defense because (1) it would have exposed him to impeachment on the basis of a prior criminal record; and (2) the answers to some questions he put to his client were vague and unsatisfactory. The court was asked to infer that the lapse of time had caused the petitioner to forget the events upon which his defense rested. I am not persuaded. Insofar as a finding may be called for by me, I find that the petitioner was not prejudiced by the delay from the time of arrest to the time of trial.

Sentence Review

The petitioner's remaining claim is that he was unconstitutionally deprived of his right to review of his sentence by the Sentence Review Board because he was not given notice of the availability of a review of his sentence.

This issue need not be considered, for Judge Sidor after a hearing on a habeas corpus petition at which this claim was raised, *Orsini vs. Warden, State Farm,* Docket No. 11565 (Nov. 8, 1967) (Tolland County Superior Court), protected him from the loss of any right to a review of his sentence on account of the lack of notice. He extended the date for applying for such review. See *State vs. Lytwyn,* 27 Conn. Supp. 78 (29 Conn. L.J., June 6, 1967, at 5).

The petitioner has not made application for sentence review. He cannot distort his own failure to avail himself of the opportunity to file an application, as permitted by Judge Sidor's ruling of November 8, 1967, into a claim that the state has failed to grant him such a review.

The petition for a writ of habeas corpus is denied.

IT IS SO ORDERED.

Dated at Hartford, Connecticut, this 2nd day of February, 1968.

M. JOSEPH BLUMENFELD

United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Per Curiam:

Chester Orsini, confined in the Connecticut State Prison after conviction of aiding and abetting the commission of an abortion, sought relief by writ of habeas corpus on the ground that the conviction was void for lack of jurisdiction of the person and for lack of a speedy trial. The District Court for the District of Connecticut, M. Joseph Blumenfeld, Judge, after hearing, denied relief, and Orsini appeals. We affirm the judgment on the grounds given in Judge Blumenfeld's thorough and reasoned opinion. .... F. Supp. .....

SUPREME COURT, U. S.

DEC 26 1968

JOHN F. DAVIS, CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1968

No. 771

UNITED STATES EX REL. CHESTER ORSINI

vs.

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On Appeal From United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT

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In the

Supreme Court of the United States

OCTOBER TERM, 1968

No. 771

UNITED STATES EX REL. CHESTER ORSINI

vs.

FREDERICK REINCKE, WARDEN

On Appeal From United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT

QUESTIONS PRESENTED

1. Does the court have jurisdiction to entertain a petition for certiorari filed after the time allowed?

2. Was the petitioner denied his right to speedy trial as guaranteed by the Sixth Amendment of the United States Constitution where a period of eleven months passed between

the date of his arrest and his trial and he neither objected at any time prior to trial to any delay, nor was prejudiced thereby?

3. Where one is arrested under an arrest warrant which is unsupported by oath or affirmation but is subsequently tried and convicted of the crime charged, does such warrant void the conviction and render it open to challenge in a habeas corpus proceeding?

STATEMENT OF FACTS

On November 13, 1964, a Superior Court bench warrant was issued for the arrest of the petitioner (defendant) charging him with the crime of aiding and abetting an abortion, in violation of Section 53-29 of the General Statutes of Connecticut. Said warrant was issued pursuant to Section 54-43 of the General Statutes of Connecticut without the support of an oath or affirmation.

On November 14, 1964, the defendant, accompanied by his privately retained attorney, Alan Soloman, went to the Bethany State Police Barracks and surrendered voluntarily to arrest. Bond was posted and the defendant released. On November 20, 1964, the defendant entered a plea of not guilty and elected a trial by jury of twelve. The defendant at the time of entering said plea, was still free on bail and in fact was free on bail at all times until his incarceration in the State Prison at Somers on September 26, 1967.

On October 26, 1965, the trial of the defendant commenced in the Superior Court in New Haven. Between the date of November 20, 1964, and the commencement of his trial on October 26, 1965, no motion for a speedy trial was filed by the defendant. On the day of trial Attorney Peter Zaccagnino first filed his appearance for the defendant. On that first day

of trial, the defendant filed a motion to dismiss the information on the ground that he had been denied the right to a speedy trial and also a motion to dismiss on the ground that the bench warrant was constitutionally invalid because it was issued without any supporting statement of probable cause. At no time prior to the first day of trial was a request made by the defendant or his counsel for a speedy trial or even that a trial date be set. After a full hearing on the above motions, both were denied.

The defendant's trial proceeded on October 26, 1965, and he was represented throughout by privately retained attorneys, Peter Zaccagnino and Alan Soloman. On the trial proper, the defendant chose not to testify, offered no evidence and was found guilty as charged on November 2, 1965. The defendant was sentenced on December 10, 1965, to a term of not less than one, nor more than four years in the Connecticut State Prison.

The defendant appealed his conviction to the Supreme Court of Connecticut which court upheld his conviction on July 13, 1967. *State* vs. *Orsini*, 232 A.2d 907; 155 Conn. 367 (1967). The defendant then filed a Motion to Re-argue to the Supreme Court of Connecticut on September 8, 1967, which was denied on September 20, 1967.

The defendant then moved the Supreme Court of Connecticut to Stay Execution of Sentence on September 22, 1967, and said motion was denied on September 25, 1967. The defendant commenced serving his sentence on September 26, 1967.

The defendant filed a petition for a writ of habeas corpus dated October 10, 1967, in the Superior Court for Tolland County which was heard at the State Prison at Somers, Connecticut, on October 26, 1967. After a full hearing said petition was denied on November 8, 1967.

Thereafter, a writ of habeas corpus dated December 7, 1967, was filed by the defendant in the United States District Court, District of Connecticut, and a Show Cause Order was issued by The Honorable M. Joseph Blumenfeld on December 20, 1967. (R. p. 8) After a full hearing before Judge Blumenfeld on January 8, 1968, said petition for writ of habeas corpus was denied on February 2, 1968. (Petitioner's Appendix A, R. p. 43)

Thereafter, on February 9, 1968, the defendant filed a notice of appeal to the United States Circuit Court of Appeals for the Second Circuit from the dismissal of his petition for writ of habeas corpus dated February 2, 1968. (R. p. 54) The Second Circuit Court affirmed the opinion of Judge Blumenfeld by Per Curium decision. (Petitioner's Appendix B, Record of Proceedings in United States Court of Appeals, 2nd Cir. p. 41)

On or about September 6, 1968, the petitioner filed an application for extension of time within which to file his petition for Writ of Certiorari. Said application was granted by The Honorable John M. Harlan, Justice of the Supreme Court of the United States, on September 9, 1968, and the petitioner was granted an extension of time to file the instant petition to November 21, 1968.

On September 25, 1968, the petitioner was released from the Connecticut State Prison on parole and remains so to date.

Thereafter, on November 25, 1968, the Petition for Writ of Certiorari was filed, the same being four (4) days after the time allowed by Justice Harlan.

ARGUMENT

I.

THE COURT LACKS JURISDICTION TO ENTERTAIN THE PETITION AS THE PETITION WAS FILED BEYOND THE TIME ALLOWED.

The petitioner made application to The Honorable John M. Harlan, Justice of the Supreme Court of the United States, on September 6, 1968, for an extension of time until November 22, 1968, within which to file the present petition. On September 9, 1968, Justice Harlan granted said application by extending the time for filing said petition until November 21, 1968. The petitioner failed to file his petition until November 25, 1968, however.

The respondent submits that this Court lacks jurisdiction over this petition, the petitioner having failed to file his petition within the time permitted by Justice Harlan.

28 U.S.C. Sec. 2101 (C);

FTC vs. *Colgate Palmolive Co.*, 380 U.S. 374, 85 S. Ct. 1035 (1965);

Bradford Electric Co. vs. *Clapper*, 284 U.S. 221 (1931).

II.

THE LOWER COURT DID NOT ERR IN DISMISSING THE APPELLANT'S HABEAS CORPUS PETITION ON THE GROUND THAT THE PETITIONER WAS DENIED THE RIGHT TO A SPEEDY TRIAL AS GUARANTEED BY THE SIXTH AMENDMENT.

Although eleven (11) months passed from the time that the petitioner pleaded not guilty, until the date of trial, respondent submits that the petitioner was not adversely affected in the prosecution of his defense.

Indeed, the petitioner presented no evidence in the Federal or State habeas corpus proceedings that the delay of eleven (11) months adversely affected the prosecution of his defense. At all times during said period he was represented by private counsel, on bail, and had ample opportunity to prepare his defense. Attorney Zaccagnino testified that the defendant knew what the charges against him were and that no motion for a bill of particulars was filed.

In the case of *United States* vs. *Holmes*, C.C.S. Pa. (1948) 168 F.2d 888, the court held that a period of three (3) years was not undue delay. In *United States* vs. *Fossoulis*, (1959) United States District Court, New York, 179 F. Supp. 645, it was held that a period of four (4) years between the time of arrest and the date of indictment was not undue in view of the fact that the defendant, as in this case, was on bail and made no demand for a speedy trial. In *Fossoulis*, the court followed the ruling set down by the United States Court of Appeals. (2nd Circuit) in *United States* vs. *Lustman*, 258 F.2d 475, *cert. denied* 358 U.S. 880, 79 S. Ct. 118, 3 L. Ed.2d, 109 where the court held that a defendant who has failed to demand a speedy trial is not entitled to a dismissal of the indictment no matter how great the delay. (See also *United States* vs. *Ewell*, 383 U. S. 116 and *United States* vs. *Sanchez*, 361 F.2d 824)

The Connecticut Supreme Court in its opinion written by Chief Justice King found that the appellant acquiesced in said delay and further stated, "Quite obviously this course was good trial strategy since the defendant was not being prejudiced by delay." (See *State* vs. *Orsini*, 155 Conn. 367 at p. 377)

Where the defendant fails to demand a speedy trial (57 A.L.R. 2d, 326 Sec. 10) or fails to object to delays in the prosecution of his case (57 A.L.R. 2d, 321 Sec. 9) he thereby waives his right to a speedy trial. This is the majority rule and fits the facts of this case squarely.

There is an abundance of other cases which might be cited involving delays far in excess of eleven months between arrest and trial, wherein the courts have held such delays, upon the facts of each case, did not constitute a denial of speedy trial. Appellee however, feels that the rationale of its position is best summed up by the reading of a portion of the opinion of the court in the *Lustman* case: —

> "The requirement of a demand leading to a trial on the merits when the defendant has not complained of the delay, 'stresses that the right to a speedy trial is not designed as a sword for defendant's escape, but rather as a shield for his protection'."

Lustman, supra, at page 478, citing in part, note the right to speedy trial, 57 Col. L. Rev. 846, 853 (1957).

The petitioner has printed as part of his appendix to his brief (Appendix A), Judge Blumenfeld's "Memorandum of Decision on Petition for Writ of Habeas Corpus" which memorandum succinctly sets forth the history of the Sixth Amendment with reference to the appellant's right to a speedy trial, and concludes that the appellant was not denied the right to a speedy trial. This conclusion is clearly warranted by the applicable law.

III.

The Fact That The Bench Warrant By Which The Defendant Was Arrested Was Not Supported By Oath Or Affirmation Did Not Render His Conviction Void For Lack Of Jurisdiction Over His Person.

It is conceded by the petitioner that he voluntarily surrendered to arrest by presenting himself at the State Police Barracks in November of 1964, and therefore respondent claims

that the petitioner thereby consented to jurisdiction over his person. (21 Am. Jur. 2d Criminal Law, Sec. 379) (See also *State* vs. *Orsini, supra*)

However, even if petitioner's arrest was illegal, (which is not conceded) that fact would not render his conviction void.

Respondent relies on *Frisbie* vs. *Collins*, 342 U.S. 519, 96 L.E. 541, 72 S. Ct. 509 (1952) in which case the defendant alleged that he had been living in Chicago, Illinois when Michigan officers forcibly seized, handcuffed, blackjacked and took him to Michigan where he was tried and convicted.

This court stated at page 522 as follows:

> "This Court has never departed from the rule announced in *Ker* vs. *Illinois*, 119 U. S. 436, 444, that the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a 'forcible abduction.' No persuasive reasons are now presented to justify overruling this line of cases. They rest on the sound basis that due process of law is satisfied when one present in court is convicted of crime after having been fairly apprized of the charges against him and after a fair trial in accordance with constitutional procedural safeguards. There is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will."

As indicated in Judge Blumenfeld's opinion, the petitioner's conviction was in fact not even based upon the arrest, and the "illegal" arrest by the police in this case raises no federal question. (See Memorandum of Decision on Petition for Writ of Habeas Corpus and cases cited — Petitioner's Appendix A p. 3a)

CONCLUSION

It is clear from a reading of Judge Blumenfeld's opinion rendered in this case and from the cases cited therein and cited in this brief, that the Superior Court for New Haven County at New Haven, had jurisdiction over the petitioner and that the present petition for a writ of certiorari should be denied, the petitioner having failed to set forth any valid reason why this court should grant the instant writ, and having filed the petition beyond the time allowed.

Respectfully submitted,

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